APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitution of the United States

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Internal Revenue Code of 1939

Sec. 145. Penalties

(a) Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declara-

tion, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution. (53 Stat. 62, as amended, 57 Stat. 144.)

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (53 Stat. 62.)

• • •

Internal Revenue Code of 1954

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. (68A Stat. 851.)

Sec. 7203. Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. (68A Stat. 851.)

Sec. 7207. Fraudulent Returns, Statements, or Other Documents.

Any person who wilfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. (68A Stat. 853.)

United States Code

Title 18

Sec. 371. Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to

effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (62 Stat. 701.)

Federal Rules of Criminal Procedure

Rule 7. The Indictment and the Information.

* * *

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

* * *

Rule 11. Pleas.

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse

to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

* * *

Rule 31. Verdict.

* * *

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * *

Rule 32. Sentence and Judgment.

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise.

directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) **Report.** The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) **Withdrawal of Plea of Guilty.** A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) **Probation.** After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

Rule 35. Correction or Reduction of Sentence.

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 36. Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Appendix B

OPINIONS AND JUDGMENTS BELOW

Court of Appeals Opinion on Remand

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17888

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,

Appellants,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Texas.

(SEPTEMBER 25, 1962)

Before TUTTLE, Chief Judge, POPE* and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: The three appellants and two others were charged in a five count indictment with attempting to evade and defeat income taxes of a named corporation. The first four counts are substantive and relate to the years 1951, 1952, 1953 and 1954 respectively. The fifth count charged a conspiracy to evade and defeat

* of the Ninth Circuit, sitting by designation.

the same corporation's income tax for the years 1951 to 1954 inclusive. After entering pleas of not guilty, and after careful and cautious consideration by the court, each of the appellants was permitted to withdraw his plea of not guilty and enter a plea of nolo contendere. Following the pronouncement of sentence and the entry of formal written judgments, motions in arrest of judgment were filed by each appellant. The motions were denied and thereupon the appellants appealed.

Sentencing of the appellants was deferred after they were allowed to enter pleas of nolo contendere. The Government strongly objected to the nolo contendere pleas. During the period of deferment, the trial judge who had accepted the nolo contendere pleas presided over a lengthy trial of the defendants Farnsworth, the two others who had been jointly indicted with the appellants. One of the two was acquitted and the jury was unable to agree on a verdict as to the other. Thereafter, on June 19, 1959, the same trial judge sentenced the appellants. The appellant Blocker was sentenced to 3 years to be served; and appellants Frazier and Lott were each sentenced to 2 years to be served, under each count, the sentences to run concurrently. Each appellant was fined the total sum of $20,000.00. The appellants owned a total of 7% of the stock of the company. Blocker was Treasurer and both Frazier and Lott were Vice Presidents.

Although their contentions are separately presented, the alleged errors relied on by Blocker and those relied on by Lott and Frazier are essentially the same and may be summarized as follows:

1. The indictment is insufficient.

2. Delay in sentencing resulted in a denial of due process.

3. The court was without jurisdiction to impose sentences on the pleas of nolo contendere after hearing the evidence presented at the trial of the other two jointly indicted defendants.

4. Defects in the formal written judgment of the court.

We will deal with each of these contentions separately. As part of the history of this case, reference is made to *Lott, et als.* v. *U. S.*, 5 Cir., 1960, 280 F. 2d 24, 367 U. S. 421; 6 L. Ed. 2d 940, 81 S. Ct. 1563 (1961).

I.

The Indictment

It is contended that the indictment does not apprise the appellants of "the nature and cause of the accusation" within the meaning of the Sixth Amendment to the United States Constitution and does not charge all the basic elements of the offense of attempting to evade and defeat corporate income taxes. The first 4 counts are substantive and are essentially the same except as to the amounts therein mentioned and the years involved. Each of these counts relates to a separate year. The fifth count charges conspiracy and relates to all of the years involved. While it is admitted that the indictment is framed in the words of the statute, it is contended that the statute is so vague that the appellants cannot determine the nature of the charge against them with sufficient certainty to enable them to make a defense or to avoid further prosecution for the same offense.

It is true that offenses must be accurately described in an indictment; and if necessary to do so, the allegations must be expanded beyond the words of the statute in order to embrace all the ingredients necessary to the offense. *U. S.* v. *Cruikshank*, 92 U. S. 542, 23 L. Ed. 588 (1876);

Babb v. *U. S.*, 5 Cir., 1955, 218 F. 2d 538; *U. S.* v. *Debrow*, 5 Cir., 1953, 203 F. 2d 699.

As examples of the contention made, the appellants cite *U. S.* v. *Strauss*, 5 Cir., 1960, 285 F. 2d 953, holding that in a prosecution against a corporate officer for alleged fraudulent transfer of corporate property in contemplation of bankruptcy, the indictment was defective because it did not set forth ". . . a plain, concise and definite statement of the offense . . .", failed to identify the property, and from aught appearing the transfer was made in the usual and regular conduct of the business; and *Clay* v. *U. S.*, 5 Cir., 1955, 218 F. 2d 483, in which it was held that an allegation of liability for tax coupled with a failure to pay was insufficient to constitute a felony violation, because there must be some affirmative act on the part of the defendant showing an attempt to evade the tax. The court observed that all that was alleged was that the defendants were engaged in the business of accepting wagers without having paid the occupational tax, which was only a conclusion unsupported by allegations of facts showing a willful attempt to evade, and therefore the indictment was insufficient.

The *Clay* case, supra, was discussed by this court in the later case of *Reynolds* v. *U. S.*, 5 Cir., 1955, 225 F. 2d 123:

> "That indictment (Clay) alleged the quo modo, it charged the attempt to evade the occupational tax 'by engaging in the business of accepting wagers . . . without having paid said occupational tax . . .' On the other hand the indictment in the present case pleads the offense substantially in the language of the statute, which is an approved mode of pleading with the single exception of an instance where the words of the statute do not contain all the essential elements of the offense. That exception can have no application here unless it be held that Spies v. United States, 317 U. S. 492

> [infra] added a substantive element to those contained in the statute defining a similar offense; and that is not true for the Spies case simply construed the statutory language, 'wilfully attempts in any manner to evade and defeat any tax . . .'. Indeed, in income tax cases, it has been stated that an indictment need not specify the means whereby the defendant attempted to evade and defeat the tax. Information as to the particular means employed may be obtained by a bill of particulars."

Also *U. S.* v. *Simmons*, 96 U. S. 360, 24 L. Ed. 819 (1878) in effect held that it was not necessary to state in the indictment the particular means by which the United States was defrauded of the tax. The defendant is entitled to a formal statement of the grounds upon which he is charged, but the Government is not held to such strictness of averments as might defeat the ends of justice. As there observed:

> "Such intent may, however, be manifested by so many acts upon the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver, with any degree of certainty, all the essential facts from which it may be fairly inferred."

A similar question arose in *Capone* v. *U. S.*, 7 Cir., 1932, 56 F. 2d 927, and the court concluded:

> "But it is contended by appellant that the indictment should have specified the means by which he attempted to evade or defeat the payment of the tax. Neither the Cruikshank Case nor any other case which we have been able to find supports this contention. In the Cruikshank Case it was stated that all rights are not guaranteed by the Federal Constitution, and that therefore, as a matter of law, a charge of conspiracy to defeat a citizen's constitutional right must show that the right threatened is one conferred by the Constitution. In other words, if a certain right is excepted in the defi-

nition of the crime, facts must be pleaded to avoid the exception.

"But in the instant case there are no exceptions, for the statute says that every attempt to evade or defeat the payment of income tax is a violation of law. What was a question of law in the Cruikshank Case, by reason of existing exceptions, is in the instant case a question of fact for the jury because of the absence of exceptions."

The indictment in the instant case goes further than merely charging the offense in the words of the statute. It expressly alleges various means by which the appellants attempted to evade the taxes such as falsifying invoices, concealing assets and diverting income. We cannot agree with the appellants that the means alleged are not adequate because of a failure to state in specific detail how these actions could result in underpayment of taxes of the corporation. *Spies* v. *U. S.*, 317 U. S. 492, 87 L. Ed. 418 (1943) discusses the statute involved and points out distinctions between subsection (a) and (b) of §145; subsection (a) being a misdemeanor and subsection (b) a felony:

"Wilfull but passive neglect of the statutory duty may constitute the lesser offense, but to combine it with a wilfull and positive attempt to evade the tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

". . . By way of illustration and not by way of limitation, we would think affirmative wilfull attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal."

Appellants contend that the indictment is deficient in failing to show that there was an understatement of the tax or a tax deficiency, citing *Lawn* v. *U. S.*, 355 U. S. 339 and *Small* v. *U. S.*, 1 Cir., 1958, 255 F. 2d 604. Count one alleges that the net income of the corporation for the calendar year 1951 according to the tax return filed was the sum of $399,135.98 and that the amount of tax due thereon was the sum of $194,482.66; whereas, the defendants then and there well knew that the net income of the corporation for the calendar year 1951 was $763,699.62 upon which the corporation owed the United States a total tax of $482,278.96 in violation of §145(b) of the Internal Revenue Code of 1939. The other substantive counts contain essentially the same type of allegations for each of the years involved, but of course the figures are different for each year. A reading of the indictment indicates no absence of the elements complained about, and alleges the requisite knowledge and intent required. *U. S.* v. *Johnson*, 319 U. S. 503, 87 L. Ed. 1546; *Cave* v. *U. S.*, 8 Cir., 1947, 159 F. 2d 464.

Another defect is claimed to be that the indictment is defective in failing to charge that any of the appellants filed the return. *Benham* v. *U. S.*, 5 Cir., 1954, 215 F. 2d 472, concluded that proof of filing the return was necessary to the completion of the offense denounced under the facts of that case. There, the defendant was charged with attempting to defeat and evade the tax of his wife "*by filing or causing to be filed*" a false return on her behalf. Appellants take the point that the allegation of "mailing and causing to be mailed", does not satisfy this requirement. This question is dealt with in *Imholte* v. *U. S.*, 8 Cir., 1955, 226 F. 2d 585, in which the defendant was convicted of aiding and abetting an attempt by the President of the corporation of which the defendant was General Sales Man-

ager, to defeat and evade a large part of the income taxes owed by the corporation. It was held that the indictment was sufficient even though it failed to allege that the defendant had anything to do with filing the return, the substantive offense being the willful attempt to evade and defeat the payment of the tax. In *U. S.* v. *Albanese,* 2 Cir., 1955, 224 F. 2d 879, the indictment alleged in part as follows: ". . . preparing causing to be prepared and causing to be mailed in the Southern District of New York, thereby filing and causing to be filed with Commissioner of Internal Revenue in Albany a false and fraudulent return". It was there contended that since the returns were filed in Albany, the indictment should be dismissed, because the venue was in the Southern District of New York. The court held that the actual filing was not an essential allegation and stated:

> "The defendant's entire course of conduct in the Southern District of New York from preparing false records to the mailing of false returns, came within the ambit of the 'attempts' statute and venue was proper."

The crime denounced by 26 U.S.C.A. §145(b) is an attempt *in any manner* to defeat or evade any tax. We conclude that the allegations in the indictment here under consideration in the language ". . . mailing or causing to be mailed . . ." is sufficient. *United States* v. *Johnson,* 319 U. S. 503, 87 L. Ed. 1546 (1943). It is not necessary to prove that each defendant took hold of the envelopes containing the returns and helped place them in the post office when mailed.

Finally, appellants assert that the conspiracy count fails to charge the basic elements of the substantive offense. *U. S.* v. *Strauss,* 5 Cir., 1960, 283 F. 2d 155. It is contended that the indictment here constitutes a mere statement of a conclusion of the pleader that acts done in connection

with the conspiracy were in violation of the statute; and that the facts alleged fail to support the charge. *Wong Tai* v. *U. S.* 273 U. S. 77, 71 L. Ed 545 (1927) concludes that an indictment charging a conspiracy to commit a crime need not allege with technical precision all the elements essential to the commission of the offense, which is the object of the conspiracy, or to state such object with the details required of an indictment charging the substantive offense. To the same effect is *Braverman* v. *U. S.*, 317 U. S. 49, 87 L. Ed. 23 (1942), wherein it is succintly stated:

> "A conspiracy is not the commission of the crime which it contemplates and neither violates nor 'arises under' the statute whose violation is its object." (citing cases)

As pointed out in *Jelke* v. *U. S.*, 7 Cir., 1918, 255 Fed. 264, an indictment for conspiracy is sufficient if it follows the language of the statute and contains a sufficient statement of an overt act or overt acts, except where the object of the conspiracy is lawful but the means unlawful.

The appellants urge upon us the holding on the recent case of *U. S.* v. *Goldberg*, (D.C. E.D. Pa., 1962) F. Supp. . In that case, the district judge held that there cannot be a single conspiracy to evade and defeat income taxes pertaining to two separate taxable years, ". . . . because of the criminal intent necessary for the substantive offense of attempted tax evasion, we conclude that a single conspiracy embracing two separate taxable years is impossible.". The court then concludes as follows:

> "It follows that persons can conspire to evade a tax only if they are fully aware of the existence of a tax obligation to the Government which they seek to conceal. Since income taxes become due and payable on an annual basis, it seems manifest that persons cannot at one and the same time conspire to evade more than one year's taxes."

It is claimed that the *Goldberg* case presented a question of first impression.

We cannot accept the reasoning in the *Goldberg* case nor the fact that it presents a question of first impression. All cases are distinguishable on the facts, but the case of *U. S. v. Johnson, et al.*, 7 Cir. 1941, 123 F. 2d 111, 123 (reversed on other grounds 319 U. S. 503, 87 L. Ed. 1546 (1943)) had under consideration the same principles involved here. In *Johnson,* the fifth count of the indictment charged all of the defendants with a conspiracy extending from January 1, 1936 for the years 1936, 1937, 1938 and 1939 inclusive, to defraud the United States of income taxes due from Johnson. The court held the indictment good. It is interesting to note that the lower court held the first four counts defective as being inconsistent and duplicitous. They were considered inconsistent because the offense against Johnson was charged as of March 15th of each year; whereas, the co-defendants "as aiders and abettors" were charged with an offense which extended over a longer period. The counts were considered duplicitous by the Court of Appeals because it was alleged that the co-defendants aided and abetted Johnson both before and after March 15th of the relevant year. Accordingly, the court concluded that the co-defendants were charged in the same count as accessories before and after the fact. In reversing the Court of Appeals, (319 U. S. 503, 87 L. Ed. 1546) the Supreme Court held:

> "In short, the Circuit Court of Appeals read the substantive counts as though they charged Johnson merely with the filing of false returns on March 15th. That may only be a misdemeanor under §145(a) of the Internal Revenue Code, but that is not the offense with which Johnson was charged. He was charged with a felony made so by §145(b), the much more comprehensive violation of attempting 'in any manner to de-

feat and evade' the payment of an income tax. The false return filed on March 15th was only one aspect of what was a process of tax evasion. And all who contributed consciously to furthering that illicit enterprise aided and abetted its commission and thereby, under §332 of the Criminal Code, became principals in the common enterprise. Therefore, non-participation in merely one phase of Johnson's attempted evasion, namely, the filing of a false return on March 15th, is in itself irrelevant, and it is equally irrelevant, that the aid which the co-defendants gave Johnson continued after March 15th as well as preceded it. The crime of each of the first four counts is the wilfull attempt to evade the payment of what was due to the revenue. All who participated in that attempt were contributors to the illicit enterprise. There was only one offense in each count, and all who shared in its execution have equal responsibility before the law, whatever may have been the different roles of leadership and subordination among themselves. There is neither inconsistency nor duplicity in these four counts and the demurrers to them were properly overruled."

Although revenue laws were not involved in *Frankfort Distilleries, Inc.* v. *U. S.*, 10 Cir., 1944, 144 F. 2d 824, 832 (reversed on other grounds and conviction in district court sustained, 324 U. S. 293, 89 L. Ed. 951 (1945)), the principles of law relating to conspiracy are correctly stated in our judgment:

"The several acts and means of making the conspiracy effective are related acts which enter into the crime, but still the single crime is that of combining and conspiring together to restrain interstate trade and commerce, or to monopolize such trade and commerce. Duplicity in an indictment means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose. Braverman v. United States,

317 U. S. 49, 63 S. Ct. 99, 87 L. Ed. 23; United States v. New York Great Atlantic & Pacific Tea Co., supra."

We conclude that the conspiracy indictment in this case is not subject to the attack made upon it.

II.

Denial of Due Process

Appellants complain that the delay in sentencing was unreasonable in the circumstances of this case and resulted in depriving them of due process of law. Two of the appellants entered pleas of nolo contendere on March 17 and the other on March 20, 1959. Two other defendants jointly indicted with the appellants (Farnsworth) entered pleas of not guilty. Appellants were called for sentencing on June 19, 1959. The delay in sentencing was occasioned by the Farnsworth trial before the same judge. One of the Farnsworths was acquitted and there was a hung jury as to the other.

Appellants rely on *Townsend* v. *Burke*, 334 U. S. 736, 92 L. Ed. 1690 (1948), which reversed the sentence of a state court as being inconsistent with due process. In *Townsend*, the defendant was held virtually incommunicado for a period of 40 hours after his arrest, during which time he was constantly and vigorously interrogated. He did not have the advice of counsel and when the trial court imposed sentence, it relied upon a record of various crimes allegedly committed by the defendant, all of which had either been dismissed or the defendant had been found not guilty. The court was misled as to the facts. In *Pollard* v. *U. S.*, 352 U. S. 354, 1 L. Ed. 2d 393 (1957), the defendant was given probation in absentia and two years later was apprehended for violation of his probation. Sentence was then passed on his previous plea of guilty. It was there

pointed out that whether delay in completing the prosecution amounts to an unconstitutional deprivation of rights, depends on the circumstances in each case. The delay must not be oppressive or calculated to deny substantial rights to the defendant.

The present rule 32(a) F.R. Crim. P., which provides that sentence should be given without unreasonable delay, is a restatement of the previously existing procedure. See Rule 1 of Criminal Appeals Rules 1933, 292 U. S. 661, 78 L. Ed. 1513. *Berkowitz* v. *U. S.*, 8 Cir., 1937, 90 F. 2d 881, concluded that the above mentioned rule of the Supreme Court requiring sentence without delay, was not adopted for the benefit or protection of the accused and therefore he cannot complain that the sentence shall not begin until 30 days from the date of its pronouncement. 28 U.S.C.A., Rule 1 following §723(a). See also *Pratt* v. *U. S.*, *C.C.A.* D. C., 1939, 102 F. 2d 275 holding failure to impose sentence during term in which conviction was had does not defeat jurisdiction to sentence at a later term; *Miller* v. *Aderhold*, 288 U. S. 206, 210-12, holding that delay in imposing sentence, regardless of the length of delay, does not deprive the trial court of jurisdiction, where the defendant raises no objection; *Miner* v. *U. S.*, 3 Cir., 1917, 244 Fed. 422, concluding that the rule requiring prompt sentences does not change the law relative to jurisdiction, but was adopted to expedite criminal cases; *Bankey* v. *Sanford*, (D.C. N.D. Ga., 1947) 74 F. Supp. 756, deciding that after a plea of guilty, it is discretionary with the court as to when sentence should be imposed; *U. S.* v. *Provo*, 17 F.R.D. 183 (1955) and cases cited in footnote, holding that a right to a speedy trial may be waived and is waived unless demanded by the accused.

As stated in *Pollard*, the delay involved must be considered in the light of the circumstances surrounding the case. In the case at bar, it is stated in the final reply brief for

all of the appellants, although admittedly not shown by the record, that counsel for Appellant Lott, when considering a change of plea from not guilty to nolo contendere, requested the court to sentence Lott prior to the trial of the two defendants who pled not guilty. The brief further states, "It is also true that the trial judge refused to grant this request.". While we do not purport to decide this case on matters not of record; even if we did, it is apparent that Appellant Lott proceeded to tender his plea of nolo contendere notwithstanding the refusal of the trial judge to grant his request for early sentence.

We see no impropriety, indiscretion, inquiry or denial of any rights whatever by the delay of approximately 30 days between the time the pleas were entered and sentence pronounced. Before the pleas were entered, the court acted with great caution and all that transpired was in the presence of the appellants and their learned counsel. Notwithstanding this fact, the court was careful to inquire of the appellants individually as to whether each had separately decided to enter the plea voluntarily and made certain that the plea was not prompted by any promises which had been made. The court warned the parties of the seriousness of the charge and explained to each appellant that the charge wa willful tax evasion. They were warned not to expect leniency and that the sentence might be five years confinement in addition to a large fine. Over the objection of the Government, the court accepted the pleas, and directed a pre-sentence investigation "for sentence at conclusion of entire case". When the appellants were called for sentencing, no motion or request for permission to withdraw the pleas was made and the tenor of their statements was approval of their former decision to enter the plea and a confession of their improper conduct. Appellate courts must assume, in the absence of anything in the record to

the contrary, that delay in pronouncing sentence was for a lawful purpose in the orderly process of handling the case. Indeed, the record here does not require any inference or presumption, because the record clearly shows, without question, that the delay was proper, lawful and completely justified in the circumstances of this case.

III.

Loss of Jurisdiction Under Pleas of Nolo Contendere

Appellants have much to say about their pleas of nolo contendere and the meaning which it carries. The definition which they seem to prefer is that "nolo contendere is a mere statement of one's unwillingness to contest and no more". *Mickler* v. *Fahs*, 5 Cir., 1957, 243 F. 2d 515, 517; *Piassick* v. *United States*, 5 Cir., 1958, 253 F. 2d 658. It is admitted that there may be an adjudication of guilt in the sense that judgment of conviction may be entered on a plea of nolo contendere. For the purposes of this case, we have no trouble with the insistence of the appellants. Reasoning further, they complain that "conviction on a plea of nolo contendere" does not permit the court to receive or consider evidence in the case before the court, or any other related case, "from which it will independently determine the extent of the defendant's guilt or *culpability* as a basis for imposing sentence or punishment"; and that such a plea "operates to preclude judicial inquiry as to all matters of fact arising under the allegation contained in the indictment".[1] From the position thus taken, the appellants then conclude, or at least strongly intimate, that the court considered all of the evidence presented during the Farnsworth trial in deciding upon the sentence to be given these appellants. They indicate that the court should have

[1] Quotations from first reply brief of Appellant Loti. Although different language is used, essentially the same contention is made by all of the appellants.

made some limiting statement as to the evidence it had heard during the Farnsworth trial. In view of the fact that there was some mention of the Farnsworth trial at the time sentence was passed, it is concluded that the appellants were tried in absentia. Pressing further, it is contended that the plea of nolo contendere was thereby rejected and the court lost jurisdiction of the case to enter a judgment of conviction and to sentence the appellants.

We are unable to follow this reasoning process. The record is somewhat to the contrary. We find no improper statements by the court in the record and nothing to indicate that the court demonstrated any impropriety or gave consideration to any improper facts at the time sentence was imposed.[2]

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[2] The following excerpts are from the record:

"Court: Does the Government have anything to say to the Court at this time before I call on the defendants to tell me whatever they want to say or their lawyers or friends want to tell me in their behalf?

"Mr. Schwartz: Your Honor, I believe the Court has heard the facts tried following these gentlemen's pleas.

"If it please the Court, at the conclusion of the defendant's statements if there are any matters which are called upon for an answer, we would respectfully request permission to answer them then, but we think there is no other statement called for in the case.

"The Court: I will not say that I will at this time.

I will call the first on the docket, Mr. Blocker first, and then Mr. Lott and Mr. Frazer." (Tr. pp. 488-9)

* * * *

"Mr. Crooker: Your Honor, you have been good enough not to limit our number of witnesses. You said you would listen as long as we put them on.

The Court: Until exhaustion.

"Mr. Crooker: I want to be fair. I have a couple more, but aside from strictly character witnesses I want to use Mr. Brigman on a few brief facts independent of character, and I believe I am going to forego the others, but unless Your Honor wants to question them I shall not offer them.

"The Court: It is your own ruling." (Tr. pp. 502-3)

Following is from statement to the court by Appellant Blocker:

"I have made some mistakes in these matters, and as I say for some time now I have recognized that fully, and I want to make that very clear to Your Honor that I do recognize it.

Looking back over what went on, I am sorry that when things were presented in an improper manner that I didn't just leave the services of the company and find employment elsewhere, but hindsight is — it is just a matter of hindsight, and it is hard to lean on that at this time.

"I will say this, today, and as far as anything in the future is concerned, I would definitely leave the services of a company before I would ever do anything, if called upon, in an improper manner.

"I am not attempting at this time in any way to whitewash what I have done in the past. For quite a long time now I have been tortured more, much more, than could possibly be done by what would be done in a Court. I own up to any improprieties that may have been permitted to exist.

"The Court: Is there any doubt in your mind about that, you used the word 'might'?

"Mr. Blocker: There is no doubt at all, Your Honor. I didn't intend to use that word.

"There are improprieties that exist.

"There is one other thing that occurs to me that you might wonder about, why if I had objection to accounting irregularities, as I pointed out, why would I have let some amount of work be done by the company out at my house in 1951, which I did at that time." (Tr. pp. 521-2)

* * * *

"I would like to say though that I filed a plea of nolo contendere with the effect of throwing myself on the mercy of the Court, and what I have said here today is to reaffirm that, and I have not regretted what I have done.

"The Court: You mean the irregularity part or the nolo plea?

"Mr. Blocker: That I have not regretted filing the nolo plea, Your Honor." (Tr. p. 523)

Mr. Crooker (of counsel) speaking to the Court;

"Mr. Crooker: I wanted to say something, but I hadn't expected the occasion to arise so quickly. What I wanted to say, Your Honor, is two or three things about the matter.

"I wanted to remark to Your Honor what you doubtless know without my suggesting it to you or reminding you of it, that any man who enters a plea of nolo contendere, there are wonderful advantages to it. If I were doing it today I would do just exactly that, I would advise these clients of ours to do precisely what they did, and knowing that I am going to say about it is intended to not take anything from exactly what they did here in open Court. They are standing by it and so am I.

"I make that remark, although don't think it is necessary to do it, but when a trial goes on in the absence of any man, even though it was set up that way himself, and with his lawyer, too, but it goes on and we do not know what was brought out —

"The Court: Right on that point, counsel, didn't you have this young man present every day and every hour taking down notes?

"Mr. Crooker: Yes, I have everything, a daily report and everything that I had. That is not what I was going to suggest. I know what exactly was testified, in substance. He is not a shorthand reporter. We didn't buy a copy of it. We did buy

In this aspect of the case the insistence of the appellants is clearly erroneous. The shoe is on the other foot. The court gave every consideration requested by the appellants. In the first place, the court was not bound to ac-

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one witness, I think, but we have a daily report." (Tr. pp. 524-5) Following is statement to the Court by Appellant Lott:

"Mr. Moody: Your Honor, Mr. Lott would like to address the Court.

"Mr. Lott: Judge, I realize that I have made a great mistake and that I should have had the courage to have gotten out in 1953 when some of the younger fellows did.

"The Court: That could be the first statement of remorse or repentance that I have heard during these last eleven weeks. Maybe I did hear, but I don't remember. Go ahead.

"Mr. Lott: I had worked for Farnsworth & Chambers Company and Farnsworth originally all of my life, and frankly I didn't know anything else.

"I realize that I made a great mistake and I shall never recover from it, and I shall never make a mistake again." (Tr. pp. 531-2)

Mr. Moody (of counsel) speaking to the Court:

"I will be brief as possible, and I will not go over a rehash of the evidence that the Court sat through for nine weeks and heard. Certainly our pleading nolo did not contribute to the length of the trial, and we had hoped this thing would be over sooner, but it was not." (Tr. p. 533)

Mr. Ballew (of counsel) speaking to the Court:

"This man has made some great mistakes while at the company. He has not tried to deny them. He feels that it has been a bitter shame on his family.

"I have every confidence that this man has learned a rather bitter lesson.

"Let me say by way of mitigation, when we got into this criminal aspect of his life, it was in August of 1957 and we did not see this dark cloud coming at any time until the day before. He insisted upon talking to Mr. Gromatzky. At that time I think I was the one lawyer in the firm most closely associated with Mr. Lott, and it was I that went to Dallas to see the Internal Revenue Service on his behalf and later went to Washington, D. C." (Tr. pp. 539-40)

* * * *

"I personally know that this man made a bad decision back in '52 and '53. He is ashamed of what he did then, and he is regretful that he didn't get out of the company like Frank Glass did and Louis Spaw." . . . . (Tr. p. 541)

Dr. E. H. Westmoreland, a witness called on behalf of Lott speaking to the Court:

"The Witness: I would like to say that every member of our congregation would come here as a witness in his behalf, and they would say he is one of the cleanest Christian men we have ever known.

"The Court: But none of them were present during the ten weeks of testimony, were they?

"The Witness: Not that I know of, sir." (Tr. pp. 550-1)

cept the pleas of nolo contendere, especially in view of the objection by the Government. At the time the plea was entered, the appellants were warned in great detail and after ordering a pre-sentencing investigation, in effect stated that sentence would be imposed at the conclusion of the entire case. Counsel for the Government made slight reference to the Farnsworth trial and did not cross-examine the appellants' character witnesses. The court imposed no limitation on any of the appellants as to the number of character witnesses offered, and permitted full statements by both counsel and appellants. Two of the appellants made statements to the court. As a matter of fact, reference made by counsel for the appellants to the Farnsworth trial is far more extensive than any reference made by the court or counsel for the Government. As to this contention, we cannot better state our conclusion now than to quote from the decision of this court when the case was here on another question (280 F. 2d 24, 28-29):

> "In considering the contention of the appellants that they were sentenced upon a determination of guilt based upon the evidence at the trial of the other defendants rather than upon their pleas of nolo contendere, a look at the record becomes desirable. What happened is this; during the proceedings for sentencing the court heard statements of counsel for the appellants seeking mitigation of punishment. In these statements references were frequent to matters which transpired at the trial of the other defendants. It was brought out that counsel for the appellants had a representative at the trial, taking notes, and reporting to counsel so that they knew, in the words of one of the attorneys 'exactly what was testified, in substance.' Two of the three appellants made statements on behalf of themselves. Character witnesses numbering five, seven, and five, for the respective appellants, testified. At the conclusion of the hearing the court stated, 'I have found each guilty of the felonies as contained in the grand

jury indictment.' Then followed an oral pronouncement by the court of the sentences. This hearing was on June 19, 1959. On June 22, 1959, the court entered, as to each appellant, a formal judgment and commitment. From them we quote:

> It is adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of * * * and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,
>
> It is adjudged that the defendant is guilty as charged and convicted.

We need not consider whether the judgment was the oral pronouncement of sentence or the formal writing. Cf. Pollard v. United States, 352 U. S., 354, 77 S. Ct. 481, 1 L. Ed. 2d 303; United States v. Hark, 320 U. S. 531, 64 S. Ct. 359, 88 L. Ed. 290; Patterson v. United States, 5th Cir. 1950, 183 F. 2d 687; Spriggs v. United States, 9th Cir. 1955, 225 F. 2d 865. In neither the oral sentence nor the formal judgment does it appear that the determination of guilt is based upon the trial of the other defendants. Any such conclusion is negatived by recital in the formal judgment that 'the defendant has been convicted upon his plea of nolo contendere.' We see no merit in this contention of the appellants."

IV.

The Judgment of the Court

At the conclusion of the statements and evidence offered by the appellants, the court made the following oral pronouncement: "I have found each guilty of the felonies as contained in the Grand Jury indictment." In its formal written judgment, the court refers to the offenses as ". . . the offenses of filing false and fraudulent income tax

returns . . ." and ". . . conspiracy to file false and fraudulent income tax returns". Immediately following these statements by the court in the formal written judgments is the specific statement that the appellants had violated the felony provisions relating to willfully attempted evasion — § 145(b) 1939 Code and § 7201 1954 Code. The judgments make no specific reference to § 145(a) of the 1939 Code and §§ 7203 and 7207 of the 1954 Code which are the misdemeanor sections. Based on the misuse of language in the characterization of the offenses in the formal written judgments, the appellants insist that they were convicted of misdemeanors, but given sentences as provided in the felony sections. It is clear to us that the record clearly demonstrates that the intent of the district judge was to sentence appellants for the felonies for which they had been indicted. Such was the oral pronouncement of the court and regardless of the characterization of the offenses, the judgments show they were convicted of violating the felony sections as charged in the indictment. The error is almost self-correcting and it is certainly nothing more than a clerical error. This clerical error properly may be called to the attention of the trial judge, if the appellants desire to do so, under the provisions of F. R. Crim. P. No. 36,[3] which authorizes the correction of such errors by the sentencing court at any time. *Costello* v. *United States*, 252 F. 2d 750, 751 (C.A. 5th); *Tseung Chu* v. *Cornell*, 247 F. 2d 929, 932 (C.A. 9th); *Ex parte Sherwood*, 177 F. Supp. 411, 413 (Ore.), certiorari denied, 363 U. S. 851.

As a matter of fact, under the provisions of Rule 35, the court may correct an illegal sentence at any time; and may

[3] "Rule 36. Clerical Mistakes. Clerical mistakes in judgments, orders or other part of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."

reduce the sentence within 60 days after receipt by the court of a mandate issued upon affirmance of judgment or dismissal of the appeal. Needless to say, the reduction of a valid sentence after affirmance is within the discretion of the trial court. Substantial time has elapsed since the appellants were sentenced. No doubt, the distinguished trial judge has given consideration to the sentences imposed. Considerations based on compassion and mercy are to be determined by the trial court.

As stated by this court in *Benham* v. *U. S.*, (1954) 215 F. 2d 472:

> "Each case stands upon its own peculiar facts and circumstances as to whether a defendant has been afforded a fair trial."

We have carefully reviewed the record and the numerous briefs filed in this case. We are convinced that all of the appellants were accorded every legal consideration to which they were entitled. We understand their disappointment, but the sentences received are not the maximum. Commendably, counsel for the appellants, in the highest traditions of advocacy, loyalty to the interest of their clients, and with a firm determination to press every conceivable point, have done everything possible for these appellants. The record not only shows that competent attention and advice were given to each appellant, but under the careful guidance of the court when the pleas were entered, and at the session of the court when sentences were pronounced, each appellant individually approved all action taken with full knowledge of the possible consequences.

The judgment is

AFFIRMED.

Court of Appeals Judgment on Remand

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1961

No. 17,888

D. C. DOCKET No. 13,298 — CRIMINAL

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
Appellants,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Southern District of Texas.

Before TUTTLE, Chief Judge, POPE and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 25, 1962

Issued:

Judgment and Commitment — H. A. Lott

Filed Jun. 22, 1959.

United States District Court for the Southern District of Texas, Houston Division.

United States of America,

v. No. Cr. 13298.

H. A. Lott

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26 U. S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of two years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A.M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

ALLEN B. HANNAY,
United States District Judge.

The Court recommends commitment to: Seagoville, Texas.

Approved: F.L.H.

Judgment and Commitment — Lee Blocker

Filed Jun. 22, 1959.

United States District Court for the Southern District of Texas, Houston Division.

United States of America,

v. No. Cr: 13298.

Lee Blocker.

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26 U. S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of three years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A.M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

ALLEN B. HANNAY,
United States District Judge.

The Court recommends commitment to: Seagoville, Texas.

Approved. F.L.H.

Judgment and Commitment — Lorn D. Frazier

Filed Jun. 22, 1959.

United States District Court for the Southern District of Texas, Houston Division.

United States of America,

v. No. Cr. 13298.

Lorn D. Frazier.

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26 U. S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of two years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A.M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

ALLEN B. HANNAY,
United States District Judge.

The Court recommends commitment to: Seagoville, Texas.

Approved: F.L.H.

Appendix C

INDICTMENT

Filed April 14, 1958
United States District Court
Southern District of Texas,
Houston Division.

United States of America,

vs.

Cr. No. 13298.

Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier

The Grand Jury Charges:

That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one RICHARD A. FARNSWORTH, SR., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., LEE BLOCKER, Treasurer of Farnsworth & Chambers Company, Inc. H. A. LOTT, Vice President of Farnsworth & Chambers Company, Inc., ALAN FARNSWORTH, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and LORN D. FRAZIER, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1951 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1951, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas,

and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1951, which was filed on or about April 16, 1952 with the Collector of Internal Revenue for the First Internal Revenue District at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1951 was the sum of $399,135.98; and that the total amount of tax due thereon was the sum of $194,482.66, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1951 was the sum of $763,599.62 upon which said net income the corporation owed to the United States of America a total tax of $482,278.96, in violation of Section 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

Second Count

That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one RICHARD A. FARNSWORTH, SR., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., LEE BLOCKER, Treasurer of Farnsworth & Chambers Company, Inc. H. A. LOTT, Vice President of Farnsworth & Chambers Company, Inc., ALAN FARNSWORTH, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and LORN D. FRAZIER, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1952 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the

general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1952, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1952, which was filed on or about May 12, 1953 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1952 was the sum of $410,937.87, and that the total amount of tax due thereon was the sum of $207,135.40; whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1952 was the sum of $495,528.77, upon which said net income the corporation owed to the United States of America a total tax of $251,122.66, in violation of Section 145(b) of the Internal Revenue Code of 1939; 26 U.S.C. 145(b).

Third Count

That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one RICHARD

A. FARNSWORTH, SR.; Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., LEE BLOCKER, Treasurer of Farnsworth & Chambers Company, Inc., H. A. LOTT, Vice President of Farnsworth & Chambers Company, Inc., ALAN FARNSWORTH, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and LORN D. FRAZIER, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1953 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1953, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1953, which was filed on or about May 24, 1954 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1953 was the sum of $179,628.93, and that the total amount of tax

due thereon was the sum of $87,907.04, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1953 was the sum of $362,929.90, upon which said net income the corporation owed to the United States of America a total tax of $183,223.55, in violation of Section 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

Fourth Count

That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one RICHARD A. FARNSWORTH, SR., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., LEE BLOCKER, Treasurer of Farnsworth & Chambers Company, Inc., H. A. LOTT, Vice President of Farnsworth & Chambers Company, Inc., ALAN FARNSWORTH, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and LORN D. FRAZIER, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1954 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1954, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farns-

worth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1954, which was filed on or about March 14, 1955 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1954 was the sum of $282,441.03, and that the total amount of tax due thereon was the sum of $135,797.53, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1954 was the sum of $406,898.80, upon which said net income the corporation owed to the United States of America a total tax of $200,515.57, in violation of Section 7201 of the Internal Revenue Code of 1954: 26 U.S.C. 7201.

Fifth Count

That on or about the 1st day of January of 1950, the exact date to the Grand Jurors unknown and continuously thereafter up unto and including the 14th day of March of 1955, in the Southern District of Texas, Houston Division and within the jurisdiction of this Court and other Judicial Districts of the United States of America, RICHARD A. FARNSWORTH, SR., LEE BLOCKER, H. A. LOTT, LORN D. FRAZIER, and ALAN FARNSWORTH, all of Houston, Texas, all hereinafter called defendants, did unlawfully, knowingly, wilfully and feloniously conspire, combine, confederate and agree together, with each other and Dunbar N. Chambers, deceased, not indicted herein, and divers other persons whose names are to the Grand Jurors unknown to violate Section 145 (b) of the Internal Revenue Code of 1939, Section 145 (b), Title 26, United States Code and Section 7201 of the Internal Revenue Code of 1954, Sec-

tion 7201, Title 26, United States Code, to-wit: To wilfully attempt to evade and defeat a large part of the income taxes due and owing to the United States of America by Farnsworth & Chambers Company, Inc. for the calendar years of 1951, 1952, 1953 and 1954 under circumstances and by the means and other manner following:

That at all times material herein:

1. Farnsworth & Chambers Company, Inc., a corporation engaged in the business of general contracting work in the State of Texas, as permitted by the State of Texas, with its principal office in Texas situated at Houston, Texas;

2. Richard A. Farnsworth, Sr. was Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc.;

3. Lee Blocker was Treasurer of Farnsworth & Chambers Company, Inc.;

4. H. A. Lott was Vice President of Farnsworth & Chambers Company, Inc.;

5. Lorn D. Frazier was Vice President of Farnsworth & Chambers Company, Inc., and

6. Alan Farnsworth was Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc.

A. It was part of said conspiracy to falsify and alter books and records, memorandums, bills and receipts and documents of Farnsworth & Chambers Company, Inc.

B. It was further a part of the conspiracy to approve falsified invoices, bills, memorandums and documents for payment by Farnsworth & Chambers Company, Inc.

C. It was further a part of the conspiracy that defendants would conceal purchases of assets of Farnsworth & Chambers Company, Inc. by representing that payments for such assets were for rentals, repair expenses, parts expenses and materials used in construction work by Farnsworth & Chambers Company, Inc.

D. It was further a part of the conspiracy to alter and delete the true records of the corporation for the purpose of concealing the true net income of the corporation.

That the Grand Jurors further charge that at the times and at the places herein named, in furtherance of the object, design and purpose of such conspiracy, the defendants hereinafter named did do and perform the following overt acts:

Overt Acts

1. Each of the overt acts alleged in the preceding four counts of this indictment, in the respective dates and places alleged therein.

2. That on or about April 16, 1952, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. with the Collector of Internal Revenue for the First Internal Revenue District at Austin, Texas.

3. That on or about May 12, 1953, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

4. That on or about May 24, 1954, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

5. That on or about March 14, 1955, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Cham-

bers Company, Inc., with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

6. On or about June 5, 1951, Richard A. Farnsworth, Sr. approved an invoice labeled "Requisition No. 12" showing Al Bubeck to be payee.

7. On or about December 31, 1951, Richard A. Farnsworth, Sr. in Houston, Texas, approved Voucher No. 47071 payable to Acme Airco No. 1 for one Amana freezer.

8. On or about January 24, 1953 in Houston, Texas, Richard A. Farnsworth, Sr. approved Voucher No. 70860 for work on a residence.

9. On or about May 4, 1954, Richard A. Farnsworth, Sr. at Houston, Texas, approved an invoice supporting Voucher No. 07490.

10. On or about April 28, 1952, Lorn D. Frazier approved an alleged invoice from Sim D. Brown.

11. On or about November 1, 1953, Lorn D. Frazier approved an alleged invoice from Herman Knox Furniture Company.

12. On or about November 25, 1952, Lorn D. Frazier approved an invoice from B. A. Hoffman.

13. On or about November 29, 1950, H. A. Lott approved Invoice No. 31701 from the National Sash and Door Company.

14. On or about May 15, 1951, H. A. Lott approved Invoice No. 10338 from the Coastal Equipment Company, Inc.

15. On or about February 25, 1952, H. A. Lott approved an alleged invoice from Sim D. Brown.

16. On or about September 26, 1953, H. A. Lott approved an invoice from G. V. Robles & Sons.

17. On or about March 31, 1954, H. A. Lott approved an alleged invoice from the Alamo Lumber Company.

18. On or about May 7, 1953, Lee Blocker at Houston, Texas, signed his name to the 1952 Corporation Income Tax Return as Treasurer of Farnsworth & Chambers Company, Inc.

19. On or about May 10, 1954, Lee Blocker at Houston, Texas, signed his name to the 1953 Corporation Income Tax Return as Treasurer of Farnsworth & Chambers Company, Inc.

20. On or about March 8, 1955, Lee Blocker at Houston, Texas, signed his name to the 1954 Corporation Income Tax Return as Treasurer of Farnsworth & Chambers Company, Inc.

21. On or about November 1, 1950, Lee Blocker approved Invoice No. 3664 alleged to be from the Coastal Equipment Company, Inc.

22. On or about December 31, 1951, Lee Blocker prepared Journal Voucher 654.

23. On or about June 2, 1951, Alan Farnsworth approved an invoice from the Hollywood Overhead Door Co.

24. On or about February 25, 1951, Alan Farnsworth approved a weekly field payroll charged to the Reagan School job.

25. On or about May 19, 1953, Alan Farnsworth approved an invoice from the Houston Iron & Steel Company.

26. On or about January 2, 1954, Alan Farnsworth approved an invoice from the Barber, Inc.

That the acts aforesaid were and are in violation of Section 371, Title 18, United States Code.

/s/ ED HELMAN
Foreman of the Grand Jury

/s/ FRED L. HARTMAN
Assistant United States Attorney.

Appendix D

NEWSPAPER ARTICLE

PAGE 16, SECTION 1 THE HOUSTON POST

SUNDAY, MAY 22, 1960

Area U.S. Judges Rule Out Pleas of 'Nolo Contendere'

Federal judges in the Southern District of Texas will no longer accept pleas of nolo contendere from individuals charged with felony offenses, U. S. District Judge Allen B. Hannay confirmed Saturday.

The new policy came to light when Johnny B. Watkins, through his attorney, Gabriel M. Nahas, attempted to enter the plea to charges of making a false statement in a job application to the Post Office here.

FEDERAL JUDGE Joe Ingraham refused to accept the plea, saying that the district judges had agreed to take nolo contendere pleas only in some cases involving corporations and misdemeanors.

Nahas then entered a plea of innocent for his client.

In the past a number of persons charged with felonies have entered the plea, which means that they will accept the judgment of the court without admitting guilt or innocence.

Most of the judges have privately considered a nolo contendere plea an out for defendants who do not want to stand in court and say that they have been guilty of a crime.

THE PLEA IS particularly important to corporations which have been charged with civil as well as criminal actions in the same case, such as tax frauds.

A guilty plea in the criminal tax action, which is always tried first, can be used against the defendant later in a civil trial.

Whether or not a nolo contendere plea will be accepted is left to the discretion of the judges in a particular federal district.